IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1773

TEXAS INTERNATIONAL AIRLINES, INC.; DELTA AIR LINES, INC.; AMERICAN AIRLINES, INC.; FRONTIER AIRLINES, INC.; OZARK AIR LINES, INC.; EASTERN AIR LINES, INC.; AND CONTINENTAL AIR LINES, INC.,
Petitioners,

v.

SOUTHWEST AIRLINES CO. AND THE TEXAS AERONAUTICS COMMISSION,
Respondents.

BRIEF OF RESPONDENT, TEXAS AERONAUTICS COMMISSION, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Respondent, the Texas Aeronautics Commission, respectfully prays that this Petition for Writ of Certiorari be denied. Policies of res judicata should serve to prevent the unending litigation of issues which have been previously decided according to settled principles of the applicable law. The opinion of the Fifth Circuit below, sustaining the injunction, correctly resolved the issues currently raised by Petitioners and should put a definitive end to the controversy.

QUESTIONS PRESENTED

1. Whether Petitioners' interests are sufficiently aligned with the governmental bodies in the prior litigation so that they are barred from attempting to enforce, in state court, an ordinance which was previously held invalid in federal court.

2. Whether abstention policies should have directed the federal courts to abstain from any decision making in the first Southwest controversy and whether the district court's granting of an injunction to stay proceedings in state court was consistent with the Anti-Injunction Statute's directive to effectuate the court's judgment.

STATEMENT OF THE CASE

The opinion of the Fifth Circuit in *Southwest Airlines Co. v. Texas International*, 546 F.2d 84 (1977), wherein the Texas Aeronautics Commission participated as intervenor-appellees, gives a clear and accurate statement of facts and issues involved in this litigation from beginning to end. The Texas Aeronautics Commission hereby adopts that statement of the case as its own.

REASONS FOR DENYING THE WRIT

I. IN GENERAL

The litigation presently before the Court is complicated and unique. The Fifth Circuit below recognized that "the federal judiciary has never faced the precise question posed by the instant facts." 546 F.2d at 98. In fact, Petitioners admit that "these exact facts may not be repeated" and that the facts are "peculiar." The Court should avoid cases which present fact situations that are unlikely to occur again. The

legal questions presented may be interesting in an academic sense. However, rules of law announced in an atypical case such as this may cause lower courts to unwittingly make "bad law" in the typical cases which provide the bulk of litigation in the federal courts. Furthermore, while the facts in the case are unique, the applicable law is not. The Fifth Circuit has decided the case in a way which is consistent with the prior decisions of this Court.

II. DUE PROCESS AND RES JUDICATA

The Fifth Circuit correctly held that the prior federal judgment concerning Southwest Airlines' right to use Love Field was res judicata, and that the injunction granted by the district court was necessary to protect the integrity of the previous judgment and did not violate the Petitioners' due process rights.

Petitioners attempt to persuade the Court that "this case, in its present posture, raises no issue about whether Southwest Airlines should fly from Love Field or DFW," and that the only issue before the Court is one of due process. It is obvious, however, that the Court cannot abstract certain elements of a case and view them in complete isolation. In the state court, Petitioners were seeking to enforce the provisions of a city ordinance which would exclude Southwest Airlines from using Love Field. The governmental entities which issued the ordinance, Dallas and Fort Worth, were the only parties who had the authority to enforce the ordinance. In the previous litigation the cities failed in their attempt to exclude Southwest from Love Field by ordinance. Petitioners here alleged no common law, statutory, constitutional, or other private remedy in the state court for the exclusion of Southwest from Love Field. Their only allegation was that the 1968 Bond Ordinance, previously held invalid, prevented Southwest from flying to Love Field. Since Petitioners have neither standing to enforce the ordinance or a private legal remedy for its violation, the previous judgment declaring the ordinance invalid

with respect to Southwest binds Petitioners. *See, e.g., Rodriquez v. East Texas Motor Freight,* 505 F.2d 40 (5th Cir. 1974), *vacated and remanded on other grounds,* _____U.S. _____, 97 S. Ct. 1891 (1977). Petitioners may argue that their pecuniary interest gives them standing to enforce the ordinance. However, their interest in its enforcement can be no greater than that of the promulgating bodies themselves, Dallas and Fort Worth. In fact, the more they urge their standing to enforce the ordinance, the more it appears that they are in privity with the cities and therefore bound by the previous judgment. Conversely, the more they argue that they are not in privity with the cities, the more it appears that they have no standing to enforce the ordinance.

The Fifth Circuit's analysis of §85(d), *Restatement of the Law Second–Judgments* (Tent. Dr. No. 2, 1975) supports its decision that res judicata binds petitioners. *See* 546 F.2d at 97–102. Under the *Restatement* analysis, a private party must show more than a special pecuniary interest when attempting to relitigate the breach of a public duty which has previously been litigated by a government body. The *Restatement* narrowly reserves the right to relitigate such issues to private plaintiffs who could recover under a scheme of remedies that "contemplate enforcement of private interests both by a public agency and the affected private parties." *Restatement of the Law Second-Judgments* §85 (Tent. Dr. No. 2, 1975) (Reporter's Note to Comment *d*). As previously stated, there was no statutory or other private remedy available to the Petitioners for private enforcement of the ordinance. The Fifth Circuit correctly adopted the *Restatement* approach "because it promotes the policies of res judicata in this factual setting. To allow relitigation by any private litigant with a pecuniary interest in the success of the new airport would open the door to recurrent, burdensome litigation. . . . To allow relitigation by all of these parties would surely defeat the res judicata policies identified above." 546 F.2d at 100.

Petitioners argue, however, that even if §85(d) of the *Restatement Second* precludes relitigation, §68.1(e)(i), provides an applicable exception. §68.1(e)(i) is not specific, but rather only vaguely refers to "potential adverse impact on . . . the interests [of Petitioners]." Petitioners also rely on Comment *h* which provides in equally vague terms that, "due consideration of the interest of persons not themselves before the court in the prior action may justify relitigation of an issue . . ." But Comment *h* follows this statement with only one example:

> "For example, in a class action, see §85, members of the class may be content to have a particular person represent them in connection with one claim, not knowing or having reason to know that an issue may be litigated in the action that is crucial to the determination of another, unrelated claim in which they have an interest."

This example, however, does not apply here. First, §68.1(e)(i) is inapplicable because the action was not a class action. Second, Petitioners make no claim that an issue decided in this case "is crucial to the determination of another unrelated claim in which they have an interest."

Petitioners claim that the federal courts denied them due process of law by preventing them from relitigating the issues in *Southwest I.* Anytime a non-party in a prior suit is barred by res judicata from bringing a subsequent suit, due process issues are raised. Nevertheless, due process of law is satisfied if the party seeking relitigation was "in privity" with a party to the prior suit or "virtually represented" by that party. Of course, "concurrent privity" and "virtual representation" are, as the Fifth Circuit below stated, "legal conclusions rather than a judgmental process." 546 F.2d at 95. Prior to the application of these conclusory terms there must be an examination of the relationship between the parties to the previous suit and the parties to the present litigation. If the relationship is such that the conclusion of "privity" or "virtual representation" is appropriate, then the result is consistent with due process and fundamental fairness.

Therefore, the crucial inquiries should be (1) were Petitioners' interests sufficiently aligned with and similar to those of the cities and the Board in the original federal court suit, and (2) were these interests fairly and adequately represented by the cities and the Board in that suit, such that a conclusion of "privity" is fundamentally fair. The second factor, fair and adequate representation, may be easily resolved. Petitioners have not claimed, nor could they reasonably claim, that the cities and the Board did not vigorously, competently and thoroughly litigate the validity of the ordinance as it applied to Southwest. Moreover, three of the Petitioners submitted amicus briefs in support of the ordinance's validity, which received full consideration by the court. 546 F.2d at 102.

The first factor, alignment and similarity of interests, deserves fuller discussion. Petitioners claim in their brief (p. 14) that "the financial interest of the CAB carriers in enforcing the phase-out of Love Field service is not the same as the governmental interest that motivated the cities and the Board." Petitioners also allege in their brief (p. 15) that the "state suit is by the only persons with a direct financial interest in the outcome. The financial consequences were deliberately excluded from consideration in the first suit, to which they were not parties." The facts simply do not support these allegations.

The interests of the parties in the two suits are virtually identical. All the parties are primarily interested in the financial success of the Dallas/Fort Worth Airport. Petitioners have, by virtue of the letter agreements, agreed to indemnify the cities and the Board to assure the retirement of bonds and other indebtedness. Petitioners' interest in the financial welfare of the airport, no matter how great, is not greater than the interest of the cities and the Board themselves. To a certain extent, the national reputation of the cities rests on the successful operation of the airport. Similarly, the ability of the cities to attract and keep industry, thus maintaining their tax base, depends on the airport's success. The collection of landing fees from

Southwest was one motivating force among many in the prior attempt to enforce the ordinance against Southwest. If that had been the only reason for the previous suit, then the cities and the Board would not have sued Southwest since they could have looked to Petitioners for the equivalent under the letter agreements.

The conclusion is thus inescapable: Petitioners' interests are sufficiently aligned with and similar to those of the cities and the Board, and those interests were fully and fairly represented by them. Accordingly, binding Petitioners to the original federal judgment does not exceed due process limits.

Petitioners present a novel argument that Respondents have waived any right to invoke res judicata since Respondents had stated at a hearing below in the district court their concern that the current litigation would not bind Petitioners. By this argument, Petitioners attempt to use a statement of counsel as to a possible future interpretation of the law of res judicata to estop Respondents from raising that defense in subsequent litigation. In the first place, the courts are in accord that preclusion against a party taking inconsistent positions relates only to statement of *fact*, not law. *Sturm v. Boker*, 150 U.S. 312 (1893); *Hartford Fire Ins. Co. v. Carter*, 196 F.2d 992 (10th Cir. 1952). *And see* 1B, Moore's Federal Practice, ¶0.405[8]. Moreover, these statements were taken out of context. Respondents realize that the law of res judicata is sometimes difficult to apply. All would concede that formal joinder of all persons with any possible or remote interest in the litigation, including those who are in privity with persons already parties, simplifies, if not obviates, possible future disputes over the scope of res judicata. But this concern cannot be reasonably viewed as a waiver of the issue before it actually arises. Nor do Petitioners suggest, as indeed they could not, that they somehow have relied upon these statements of concern by Respondents. Even if statements as to the law by counsel were covered by this doctrine of preclusion, no estoppel

can result. Reliance by Petitioners must be shown. *Gleason v. United States,* 458 F.2d 171 (3d Cir. 1972); *Texas Co. v. Gulf Refining Co.,* 26 F.2d 394 (5th Cir. 1928). Petitioners cannot even show that by making such suggestions of possible legal effects that Respondents were somehow benefited in the prior suit. *See Buder v. United States,* 332 F. Supp. 345 (E.D. Mo. 1971). Furthermore, the rule is clear that this doctrine of preclusion is limited to inconsistent *factual* statements made in the *same* proceedings, and not in separate successive proceedings. *In re Double D Dredging Co.,* 467 F.2d 468 (5th Cir. 1972).

III. ABSTENTION AND THE ANTI-INJUNCTION STATUTE

The Petitioners allege that by invoking the relitigation exception to the Anti-Injunction Act, 28 U.S.C. §2283, the courts below have "foresaken federalism." The purpose of the Anti-Injunction Act is to "avoid unseemly conflict between the state and the federal courts." *NLRB v. Nash-Finch Co.,* 404 U.S. 138, 146 (1971). In rejecting this Court's decision in *Toucey v. New York Life Ins. Co.,* 314 U.S. 118 (1941), Congress made a legislative determination that the inability of the federal courts to enjoin the relitigation of issues by state courts was more likely to create conflict than avoid it. The Congress recognized that, although federal courts should generally refrain from enjoining proceedings in state courts, a federal court must retain the injunctive power "to protect or effectuate its judgments." This provision insures that the federal courts can enjoin the relitigation of issues which have been fully and finally adjudicated.

The relitigation exception prevents multiple litigation of the same issue and it assures parties in a federal court that they will not be subjected to the possibility of a subsequent conflicting state court judgment which the Supreme Court may or may not

decide to review. *Woods Exploration and Producting Co. v. Aluminum Co. of America,* 438 F.2d 1286, 1312 (5th Cir. 1971), *cert. denied,* 404 U.S. 1047 (1972). Rather than "forsaking" the principles of federalism, the proper use of the relitigation exception defends them. "[N]othing would be more productive of friction between the state and the federal courts as to permit a state court to interpret and perhaps to upset such a judgment of a federal court." *Jacksonville Blow Pipe Co. v. Reconstruction Finance Corp.,* 244 F.2d 394, 400 (5th Cir. 1957).

The Petitioners cite *Lamb Enterprises, Inc. v. Kiroff,* 549 F.2d 1052 (6th Cir. 1977) for the proposition that the principles of equity, comity and federalism require a federal court to refrain from enjoining the relitigation in a state court of a claim that was previously decided by a federal court. The decision of the Sixth Circuit in *Lamb Enterprises* is clearly distinguishable from the present situation and conflicts in no way with the Fifth Circuit decision below. In that case, the D.C. Circuit upheld a district court's judgment which had denied the plaintiff recovery because the suit was barred by the three year statute of limitations in the District of Columbia. The plaintiff then sought to pursue his cause of action in the Ohio state courts. The defendant persuaded an Ohio federal district court to enjoin the parties from "relitigating" the matter in the state courts. The Sixth Circuit held that the injunction was improper because the suit in the D.C. Circuit had not fully and finally adjudicated all of the matters sought to be litigated in the Ohio state court. The Ohio federal district court in *Lamb Enterprises* had improperly enjoined the parties from seeking a state court determination of whether, among other things, the plaintiff was barred by the Ohio statute of limitations to pursue his cause of action.

In the present case, the Petitioners do not contend that the decision in *City of Dallas, Texas v. Southwest Airlines Co. (Southwest I),* 494 F.2d 773 (5th Cir. 1974), *cert. denied,* 419 U.S. 1079 (1974) was not a full and final adjudication on

the merits. Moreover, the Petitioners do not claim that the injunction bars them from presenting any issue in the state court which has not been adjudicated in the federal courts. It only enjoins relitigation of the issue of the validity of the ordinance with respect to Southwest's right to use Love Field. As the Fifth Circuit below explained: "Preventing this affront to the federal judgment will not preclude Texas courts from addressing the legal issues that underlie this dispute." 546 F.2d at 93, n. 29. "The district court injunction applies, quite narrowly, to relitigation of the Love Field controversy only as it affects Southwest. The CAB airlines can continue to litigate their rights to serve Love Field even if the injunction is affirmed." 546 F.2d at 91, n. 19. The state suit was, by admission, a direct attack on the federal court's previous judgment and amounts to nothing more than an attempt to relitigate the identical issues resolved in *Southwest I.*

No one questions the constitutional power of the federal courts to hear a state claim pendent to a federal claim. However, unless the exercise of this power is merely a meaningless formality, a federal court must be free to exercise the injunctive power to protect its judgments from subsequent attack in state courts. Through a strained process of reasoning, Petitioners argue that the previous determination of the issue in *Southwest I* is not worthy of judicial protection. The basis of the argument is that the federal courts should have abstained in *Southwest I* to avoid the disruption of the state's internal affairs which might result from a federal court's interpretation of the powers of a state agency vis-a-vis a city. *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943). Thus, Petitioners contend that the prior suit was a mere "forecast" of Texas law and that the state courts can reconsider the very question answered in *Southwest I.*

The assertion that the District Court in Travis County can review the decision in *Southwest I* is patently outrageous. The effect of this would be to subject all federal court judgments in which a question of state law was involved to subsequent

state suits alleging that the federal court should have abstained in the previous suit. The Petitioners' suggested state court review of federal "forecasts" would effectively destroy the rule of *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), since the federal courts could no longer answer questions of state law with authority. There can be no doubt that abstention considerations do not arise after a final judgment in federal court has been entered and the time for direct review has passed. The abstention doctrine is a discretionary device used to accord deference to state courts in matters where state law is uncertain. The failure of a court to exercise this discretion should have no effect on the validity and enforceability of its final judgments.

Should this Court choose to consider, at this late hour, whether abstention was appropriate in *Southwest I*, it will conclude that abstention would not have been proper, and certainly not mandatory. Abstention "is an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it. Abdication of this obligation to decide cases can be justified under this doctrine only in . . . exceptional circumstances." *Allegheny County v. Frank Mashuda Co.*, 360 U.S. 185, 188–189 (1959). This Court, in *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976) has recently described the three instances in which abstention is appropriate.

The first category where abstention is justifiable is in cases questioning the constitutionality of a state law or order where the state law is unclear but is subject to an interpretation which would render it unnecessary to reach the federal constitutional question. *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941). The basis for *Pullman* abstention is the federal court's natural reluctance to unnecessarily declare state statutes unconstitutional. However, in *Southwest I*, no federal constitutional issue of this nature was raised. Moreover, there was no ambiguity in the state law. The absence of any relevant state court decision on that law did not prevent the federal court from correctly applying the unambiguous state law.

See Wisconsin v. Constantineau, 400 U.S. 433 (1971). In addition to the reasons stated by the Fifth Circuit in its opinion below, all doubt as to the clarity of state law as it relates to the Texas Aeronautics Commission's action with respect to Southwest and Love Field was laid to rest by a recent statute enacted by the Texas Legislature. That statute, entitled "Aeronautics Commission–Validation of Certain Actions of the Texas Aeronautics Commission," Tex. Laws, 1977, Chap. 325, §1, at 863, enacted May 30, 1977, effective May 30, 1977, validates *all* orders made by the Texas Aeronautics Commission prior to January 1, 1977, granting certificates of authority to intrastate carriers. (Appendix A.) Even prior to the statute's enactment, the state expressed its approval of the merits of the federal judgment in question. The Attorney General of Texas stated: "The agency charged with general regulatory authority over private airports in Texas is the Texas Aeronautics Commission. V.T.C.S. Art. 46c–6. *See City of Dallas v. Southwest Airlines Co.,* 494 F.2d 773 (5th Cir. 1974)." (A. G. Opinion No. H–973, April 6, 1977.) (Appendix B, Page 2, Paragraph 3.)

The second circumstance in which abstention is proper is to avoid "needless friction" with state policy where unsettled issues are "intimately involved with sovereign prerogative." *Louisana Power and Light Co. v. City of Thibodaux*, 360 U.S. 25, 28 (1959). The bare fact that the previous suit involved the relationship of the city and state would not justify abstention in *Southwest I. Allegheny Court v. Frank Mashuda Co.,* 360 U.S. 185 (1959). Furthermore, before a federal court can decline to exercise its properly invoked jurisdiction, there must exist more than the potential for conflict in the results of adjudication. *Meredith v. Winter Haven,* 320 U.S. 228 (1943). There were no "difficult questions of state law bearing on policy problems of substantial public import" presented in *Southwest I.* There was also no possibility of "needless friction" with the state. Although the suit involved a determination of the relative powers of a city and a state agency, both parties voluntarily submitted to the federal court's jurisdiction. Either the cities or the Texas Aeronautics Commission could have

raised the issue of abstention if there was concern that a federal resolution of the state question was inappropriate. "If the State voluntarily chooses to submit to a federal forum, principles of comity do not demand that the federal court force the case back into the State's own system." *Ohio Bureau of Employment Services v. Hodory,* ____U.S. ____, 97 S. Ct. 1898, 1904 (1977). As Judge Wisdom stated in the decision below: ". . . it cannot be said that a federal court disrupts harmonious relations with a state by responding to a request by the bickering state agencies to resolve their dispute." 546 F.2d at 93.

The third instance where abstention is appropriate is in those suits where a party seeks to enjoin a state criminal or quasi-criminal proceeding in the absence of bad faith, harassment, or a facially invalid state statute. *Younger v. Harris,* 401 U.S. 37 (1971); *Juidice v. Vail,* ____U.S. ____, 97 S. Ct. 1211 (1977). Of course, *Southwest I* was neither an attempt to restrain a criminal or quasi-criminal proceeding nor an attempt to interfere with state court action of any kind. Thus, since *Southwest I* did not fall within any of the forms of abstention and since no other factors counseled against federal proceedings, abstention in *Southwest I* would have been in error.

Finally, if Petitioners are not considered in privity with any of the parties to the original federal court judgment, as they contend, they have no right to interfere with the federal judgment. By instituting the state court suit, Petitioners are blatantly interfering with the federal judgment. As counsel for one of the Petitioners announced before the state court: "This is [not] an effort to undermine the federal decision . . . . This is a frontal attack on it. The word undermine implies something covert about it. We come in with flags flying." 546 F.2d at 89.

The courts have held that injunctive relief is an appropriate remedy to prevent such intermeddling with federal court decisions. In *Doe v. Ceci,* 517 F.2d 1203 (7th Cir. 1975), the federal district court had enjoined certain personnel responsible for operating and administering a certain county hospital from interfering with doctors performing legal abortions therein.

Subsequently, a resident and taxpayer of the county instituted a state court suit against one of the hospital's administrators and county officials *who had not been parties to the federal court suit*. The Plaintiff in the state court suit sought to enjoin disbursements of county funds to perform abortions in the hospital on indigent women. The plaintiffs in the federal court action then obtained an injunction against the state court relitigation. The Seventh Circuit affirmed, holding that issues sought to be litigated in the state court were identical to some of those adjudicated in the federal court proceeding. The Court noted that "only one of the defendants in the case before Judge Ceci [of the state court], Mundy, had been named in *Doe v. Mundy* [the federal court suit], which would have made it possible for the other defendants before Judge Ceci to contend that they were not bound by the federal order . . . ." 517 F.2d at 1207, n. 3. The court, however, rejected this argument, holding that "[u]nder all the circumstances," *id.*, the injunction was justified, since otherwise the "net result" would be to prevent the parties to the federal court judgment from complying with the federal decree. 517 F.2d at 1206. *See also Montgomery County Board of Education v. Shelton*, 327 F. Supp. 811 (N.D. Miss. 1871); *South Central Bell Telephone Co. v. Constant, Inc.*, 304 F. Supp. 732 (E.D. La. 1969), *affirmed*, 437 F.2d 1207 (5th Cir. 1971).

From a cursory review of the torturous path that this litigation has laboriously followed in the nine years since it began, no one can deny the uncertainty, the waste of resources and the harassment that has occurred. After eight attempts in the last three years, the federal courts have refused to support the ouster of Southwest Airlines from Love Field. The public interest cannot endure this cloud of recurring litigation hovering over our judicial system. The Texas Legislature has, in effect, attempted to end this litigation by passing an act validating the actions of the Texas Aeronautics Commission in the last session just ended. Fundamental justice dictates a court-enforced end to this litigation. By denying this Petition for Writ of Certiorari, the Court can, at last, give final and definitive validation to the many prior judicial determinations of this issue.

CONCLUSION

For the reasons stated above, Respondents respectfully submit that the Petition for the Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, J. David Hughes, attorney for Respondent herein and a member of the bar of the Supreme Court of the United States, hereby certify that on the ____day of August, 1977, I served three copies of the foregoing document, in duly addressed envelopes, with airmail postage prepaid, as required by Rule 33 (1) of this Court upon each of the parties represented in this proceeding.

J. DAVID HUGHES
Assistant Attorney General
P.O.Box 12548
Austin, Texas 78711

APPENDIX

APPENDIX A

AERONAUTICS COMMISSION–VALIDATION OF CERTAIN ACTIONS

CHAPTER 325 [86]

H. B. No. 939

An Act relating to validation of certain actions of the Texas Aeronautics Commission.

Be it enacted by the Legislature of the State of Texas:

Section 1. All orders previously made, prior to January 1, 1977, by the Texas Aeronautics Commission granting certificates of public convenience and necessity for the operation of intrastate air carriers are hereby in all respects validated, ratified, and confirmed.

Section 2. The importance of this legislation and the crowded condition of the calendars in both houses create an emergency and an imperative public necessity that the constitutional rule requiring bills to be read on three several days in each house be suspended, and this rule is hereby suspended, and that this Act take affect and be in force from and after its passage, and it is so enacted.

Passed by the House on May 10, 1977: Yeas 125, Nays 9, 6 present, not voting; passed by the Senate on May 19, 1977: Yeas 26, Nays 4.

Approved May 30, 1977.

Effective May 30, 1977.

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86. Vernon's Ann. Civ. St. art. 46c–6 note.

APPENDIX B

THE ATTORNEY GENERAL OF TEXAS

AUSTIN, TEXAS 78711

JOHN L. HILL
ATTORNEY GENERAL

April 6, 1977

The Honorable Henry Wade
Criminal District Attorney
Sixth Floor, Records Building
Dallas, Texas 75202

Opinion No. H- 973

Re: Authority to form a joint airport zoning board under article 46e-3, V.T.C.S.

Dear Mr. Wade:

You have requested an opinion of this office on the following question:

> Can the County of Dallas and the City of Mesquite, a municipal corporation, form a Joint Airport Zoning Board under the statutory authority of Article [46e-3] Vernon's Texas Civil Statutes where the ownership and control of the airport is less than absolute?

The statute to which you refer, a part of the Airport Zoning Act, as amended, reads in pertinent part:

> (1) In order to prevent the creation or establishment of airport hazards, every political subdivision having an airport hazard within its territorial limits may adopt, administer, and enforce . . . airport zoning regulations for such airport hazard area . . . .
>
> (2) Where an airport is owned or controlled by a political subdivision . . . and any airport hazard area appertaining to such airport is located outside the territorial limits of said political subdivision, the political subdivision owning or controlling the airport . . . and the political subdivision within which the airport hazard area is located may create . . . a joint airport zoning board, which board shall have the same power . . . .

You advise that the City of Mesquite presently zones the area surrounding a private airport located within its city limits, but the approach for the airport also creates an airport hazard area located in the unincorporated territory of Dallas County. The City has entered a written agreement with the airport owner giving the City a preemptive "right of first refusal," i.e. the privilege of purchasing the facility at the price (deemed acceptable by the owner) actually offered to the owner by a bona fide purchaser. The airport is neither "owned or controlled" by the City of Mesquite nor the County of Dallas otherwise.

A preemptive right of first refusal is not an option but may ripen into an option, which in turn may ripen into a contract of purchase and sale. Sinclair Refining Co. v. Allbritton, 218 S.W.2d 185 (Tex. 1949); Henderson v. Nitschke, 470 S.W.2d 410 (Tex. Civ. App. -- Eastland 1971, writ ref'd n.r.e.). It gives the holder of the right no power to compel an unwilling owner to sell. Owens v. Upper Neches River Municipal Water Authority, 514 S.W.2d 58 (Tex. Civ. App. -- Tyler 1974, writ ref'd n.r.e.). See also Draper v. Gochman, 400 S.W.2d 545 (Tex. 1966). Even the holder of an unconditional option possesses only an executory contractual right that passes no title. Roberts v. Armstrong, 231 S.W. 371 (Tex. Comm'n App. 1921, jdgmt. adopted). See also Click v. Seale, 519 S.W.2d 913 (Tex. Civ. App. -- Austin 1975, writ ref'd n.r.e.).

The facts supplied us indicate that neither the County of Dallas nor the City of Mesquite "owns" the airport within the meaning of the statute. Neither do we believe the airport is "controlled" by either municipal corporation within the meaning of the statute. The term "control" generally connotes the power and right to manage the facility. See State v. Camper, 261 S.W.2d 465 (Tex. Civ. App. -- Dallas 1953, writ ref'd). See also Anderson v. Stockdale, 62 Tex. 54, 61 (1884); Robertson v. State, 159 S.W. 713 (Tex. Crim. App. 1913). While some measure of control may be said to exist by reason of the statutory power conferred by article 46e-3, to zone for "airport hazards," the power extends only to trees, structures, or land use which interfere with the safe use of the airport, and it gives the city or the county no power to regulate the operation of the private airport itself. Cf. Atkinson v. City of Dallas, 353 S.W.2d 275 (Tex. Civ. App. -- Dallas 1961, writ ref'd n.r.e.), cert. denied, 370 U.S. 939 (1962). The agency charged with general regulatory authority over private airports in Texas is the Texas Aeronautics Commission. V.T.C.S. art. 46c-6. See

City of Dallas v. Southwest Airlines Co., 494 F.2d 773 (5th Cir. 1974).

We answer, therefore, that under the facts given us the County of Dallas and the City of Mesquite do not have authority under article 46e-3 to form a Joint Airport Zoning Authority with respect to an airport not owned or controlled by either of them. Cf. Attorney General Opinion M-1278 (1972). We do not address any question relating to any power that the political subdivisions may exercise independently under the first provision of the statute.

S U M M A R Y

The County of Dallas and the City of Mesquite do not have authority under article 46e-3, V.T.C.S., to form a Joint Airport Zoning Authority with respect to an airport not owned or controlled by either of them.

Very truly yours,

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APPROVED:

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